Memorandum from Professor David Howarth, Professor of Law and Public Policy, University of Cambridge (SCC0018)

Enforcing against Contempts of Parliament – a modest proposal

The problems of how to enforce a determination by the House of Commons that a person who is not a member of the House has committed contempt of the House are well known. The status quo is unsatisfactory and getting worse. Dominic Cummings' dismissive defiance of the Digital, Culture, Media and Sport Committee will be familiar to members of the Committee of Privileges. Merely admonishing those in contempt is not an effective deterrent. Sir David Natzler's fear expressed in his 2017 memorandum to the Committee that the Emperor will be shown to have no clothes has arguably now come to pass, but the other solutions suggested at that time, amending Standing Orders or creating statutory authority also present serious difficulties.

As for amending standing orders, no one knows whether courts, whether here or in Strasbourg, would uphold penalties imposed purely on the basis of the House's own authority. As for statute, some suggestions for creating limited statutory authority, for example a previous suggestion by Nigel Pleming QC and myself that a short Act of Parliament might give the House authority to penalise contempt but then state that all proceedings under the Act were protected by Article IX of the Bill of Rights 1688, now look less appealing because of the radical implications of remarks by Lord Carnwath in his judgment in the *Privacy International* case ([2019] UKSC 22). In the second, admittedly not technically binding, part of his judgment, Lord Carnwath said "it is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review." These remarks raise the alarming possibility that the judges might regard Article IX, or at least a modern extension of Article IX, as an ouster clause whose validity the courts will refuse to recognise.

The option of passing a comprehensive statute and accepting extensive judicial control will no doubt be explored in other submissions to the Committee. Several options exist. For example, the Australian statute expressly empowers Parliament itself to impose penalties, whereas the US approach includes a statutorily created crime that Congress can refer to the prosecution authorities, who may or may not prosecute, but also allows House Committees and the Senate themselves to bring some accusations of contempt directly to court in a civil action. Each has advantages and disadvantages, but all have the disadvantage of inviting judges to review or question determinations made in Parliament, so threatening the balance of the constitution affirmed by Article IX.

But the question arises of whether a fourth option exists, of creating effective penalties for contempt in ways that do not invite the courts to review decisions of the House. There is one such possibility: Parliament could enact that all public officials and public bodies must take into account when exercising any discretion they might have in conferring any benefit on any person or in deciding whether any person was a fit and proper person to exercise any office or hold any licence the fact that the person had been admonished by the House for contempt.

Such a duty would apply, for example, to decisions to employ a person in the public

service (including the decision to hire Mr Cummings as a Special Adviser), to win a public contract, to act as a director of a company and to be authorised to carry on business in the financial services sector.

The public officials and bodies concerned would be subject to judicial review, but no need would arise for the courts to inquire into the underlying decision of the House. That is because any judicial review would be of the public officer or body, not of the House, and the grounds of any review would not require any proceedings of the House to be brought into question.

The duty would be to consider the fact that the person had been admonished. The statute itself would establish the relevance of an admonishment to the discretion being exercised but the weight to be given to it would be a matter for the officer or body. The legal questions that would arise would be (a) whether the admonishment had in fact been taken into account, (b) whether the weight given to it was within the range that a reasonable official or body could give to it, and (c) if the discretion had been exercised against the individual and fundamental rights were engaged, whether the decision was proportionate.

Ground (a) is a matter of fact about the public officer or body and so needs no examination of parliamentary process. Grounds (b) and (c) might conceivably result in some consideration of the reasons for the admonishment, but Article IX forbids any questioning of the House's reasoning on the part of the officers and bodies themselves, and so it would be an extraordinary, and illegitimate, leap for a judge to say that an officer or body should have rejected the House's reasoning. Of course, a risk exists that a court might make that leap, but the risk looks low. Even those who agree with Lord Carnwath that the rule of law requires the courts to ignore ouster clauses have no obvious basis for claiming that the rule of law requires non-judicial public officers and bodies to question determinations of the House of Commons.

Would such a provision be effective as a deterrent? No evidence currently exists either way on that question and it may be that someone like Mr Cummings might be confident that someone like the Prime Minister would appoint him to a public job in any event. But the vast majority of those who appear before select committees do not enjoy Prime Ministerial patronage and in any case Prime Ministers are accountable to the House for their appointments. In addition, the threat of judicial review might make even a Prime Minister think twice.

More generally, central and local government let vast numbers of contracts every year and the phrase 'fit and proper person' appears in current legislation more than 600 times. That alone should make all except the most cosseted and brazen at least nervous when they contemplate holding the House in contempt.

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